

August 8, 2007

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*; MB Dkt No. 07-29

Dear Ms. Dortch:

On August 7, 2007, Thomas Woodbury and Eve Konstan of Home Box Office, Inc., Steven Teplitz of Time Warner Inc., and the undersigned held separate meetings with: (1) Monica Desai, Steven Broeckaert, and Mary Beth Murphy of the Media Bureau; and (2) Rick Chessen and Colin Baker of the Office of Commissioner Michael Copps.

We pointed out that expanded discovery as a matter of right in program access complaints would not only be harmful, because it would encourage MVPDs to engage in “fishing expeditions” to learn the details of their competitors’ carriage contracts, but it is entirely unnecessary. Where discovery is warranted, the Commission has “provide[d] the staff with flexibility to assess each case and order discovery accordingly.”¹ *Thus, the Commission already has the authority under its existing rules to obtain all the documents it deems necessary in program access disputes.*

We also discussed the reasons why a mandatory arbitration requirement is unnecessary, would delay resolution of complaints, and would increase the burdens on the Commission and the parties.

¹ *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 - Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report and Order, 8 FCC Rcd 3359, ¶135 (1993) (“In some cases, we expect that the reviewing staff will itself conduct discovery by issuing appropriate letters of inquiry or require that specific documents be produced.”); *see also id.* ¶ 136 (“If the staff cannot readily identify what information is needed, it can direct the parties to submit discovery requests and supporting memoranda”).

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Moreover, the Commission lacks authority to impose mandatory arbitration under Supreme Court precedent (a party “cannot be required to submit to arbitration any dispute which he has not agreed so to submit”²) and federal law (the Alternative Dispute Resolution Act³ “prohibits a federal agency from requiring any person to consent to arbitration” in order to “ensure that the use of arbitration is *truly voluntary* on all sides”⁴).

Finally, although some parties have criticized the Commission’s program access procedural rules, in our view that criticism is unwarranted. In the 15 years since the rules were adopted, programmers and MVPDs have conducted thousands of carriage negotiations, and only a handful have resulted in complaints. Of those complaints, the vast majority have been settled prior to a Commission decision. MVPDs and programmers can and do reach carriage agreements at the bargaining table without government intervention, and the fact that the Commission’s rules encourage that result is the basis for congratulations, not criticism.

The discussions during each of these meetings were consistent with the reply comments filed by Time Warner Inc. in the above-captioned proceeding.

Please contact me with any questions regarding this matter.

Sincerely,

/s/ Michael H. Hammer

Michael H. Hammer

Counsel for Home Box Office, Inc.

cc: Monica Desai
Mary Beth Murphy
Steve Broeckaert
Rick Chessen
Colin Baker

² *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 648 (1986). *See also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (“[A] party who has not agreed to arbitrate will normally have a right to a court’s decision about the merits of its dispute.”); *Air Line Pilots Ass’n v. Miller*, 523 U.S. 866, 869, 876 (1998) (holding that employees “need not submit fee disputes to arbitration when they have never agreed to do so”).

³ See 5 U.S.C. §§ 571-584.

⁴ S. Rep. No. 101-543, at 13, *as reprinted in* 1990 U.S.C.C.A.N. 3931, 3943 (emphasis added). *See also* 5 U.S.C. § 575(a)(1) (Alternative Dispute Resolution Act section stating that arbitration is only allowed “whenever all parties consent”); *id.* § 572(c) (Alternative Dispute Resolution Act section reaffirming that agency arbitration mechanisms “are *voluntary* procedures”) (emphasis added).